

SECOND THOUGHTS: SUPREME COURT CITATION OF DISSENTS & SEPARATE CONCURRENCES, 1949-19996

Peter McCormick*
Alberta

In this paper the author explores the practice of our final Court in the drafting of reasons for decision and traces the development of the lines of authority. The writer also reviews the citation traditions of the Court from the abolition of appeals to London up to the present time.

Dans cet article, l'auteur examine la pratique du plus haut tribunal concernant la rédaction des motifs de jugement, et il relève le développement des tendances dans les autorités. Il brosse aussi un tableau de la tradition de références que fait la Cour suprême, depuis l'abolition des appels à Londres jusqu'à aujourd'hui.

I.	<i>Introduction</i>	369
II.	<i>Why cite authority</i>	370
III.	<i>How frequently are minority opinions cited?</i>	375
IV.	<i>Minority opinions: who does the citing?</i>	379
V.	<i>Minority opinions: who is cited?</i>	382
VI.	<i>Citing minority opinions: the phenomenon of self-citation</i>	386
VII.	<i>Conclusion</i>	393

I. Introduction

It is not difficult to understand why the Supreme Court of Canada so frequently cites judicial decisions in the rationale that it provides for its own decisions — in the Anglo-American judicial system of which Canada is an example, the citation of judicial authority is the preferred ammunition in the courts' explanatory arsenal.¹ The most important development in this regard has been the shift in balance away from "the English authorities" the Court once followed so assiduously (to Bora Laskin's disgust²), and toward the cultivation of the

* Peter McCormick, of the University of Lethbridge, Lethbridge, Alberta

¹ As distinct from the continental European approach, which is more likely to emphasize academic sources. See e.g. M. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven & London: Yale University Press, 1986); and J.-L. Goutal, "Characteristics of Judicial Style in France, Britain and the U.S.A." (1976) 24 Am. J.Comp. L. 43. For a similar point in a more explicitly Canadian context, see Madame Justice C. L'Heureux-Dubé, "By Reason of Authority or by Authority of Reason" (1993) 27 U.B.C. L. Rev. 1.

² See B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038. Laskin criticized what he called the "captive court" and deplored the way it would treat as final the fact that "the English authorities have decided."

Court's own distinctive and authentically Canadian jurisprudence. This process is now well under way; for the last several years, the Supreme Court has been citing its own prior decisions more often than it cites all other judicial sources combined.

But what can explain the extent to which the Supreme Court cites, not its own prior decisions, but its own prior dissents and separate concurrences — that is to say, those sets of explanatory reasons that were rejected at the time by the majority of the Court? A central principle of the common law is the notion of *stare decisis* — usually rendered as “let decided matters stand.” But “decided matters” refers to judicial *decisions*, to the reasons of a unanimous Court or of a majority of the specific panel; this particular umbrella cannot cover the reasons of the judges who explicitly disagree with that decision, and who wrote to explain the reasons for that disagreement. If we refer to prior decisions as “authority,” what is the appropriate way to refer to these minority reasons, and what are we to think of the fact that they are frequently cited and quoted, often in ways that are indistinguishable from the citation of the decision itself?

To be sure, the practice is not entirely incomprehensible. It has been suggested that one reason judges write dissents is because they seek vindication at the hands of a later Court³ — and the quest for such subsequent vindication is doomed beforehand if some clear convention exists that unconditionally prevents judges from ever citing these reasons. This might be a perfectly plausible reason for writing minority reasons (“I write separately now so that someone may adopt my ideas in future” makes logical sense) but it scarcely plausible as a motive for citing such reasons (“I cite this dissent today so that someone will cite my own dissent tomorrow” does not). It remains anomalous that members of the Court — and especially the majority of the Court — should be citing as “authority” ideas that the majority of the Court was unwilling to endorse when they were put forward. What I wish to investigate in this article is the frequency of such a practice, the extent to which it has been evolving over time, the judges who most frequently cite minority opinions, and the judges who are most frequently cited.

II. *Why cite authority*

To begin with the obvious: “Presumably a citation means something to the person citing, and presumably he anticipates that it will have some meaning to a reader.”⁴ That is, a judge uses a specific citation for a reason: because of the congruency of a factual situation or legal context; or because of the rigour of the doctrinal analysis or the succinctness of its conclusions; or because of the reputation of a specific court or (perhaps more debatably) a specific judge. In the most general terms, a case is cited because it contributes to explaining to the relevant audience (which includes but is by no means limited to the immediate

³ A. Scalia, “The Dissenting Opinion” (1994) J. of Supreme Court Hist. 33 at 37.

⁴ J.H. Merryman, “The Authority of Authority” (1954) 6 Stan. L.Rev. at 613.

parties) why the outcome is appropriate. Although there are of course important differences — such as the hierarchy of citability implied by the appellate process itself, and the real (although possibly fading) rigour of the doctrine of *stare decisis*⁵ — this is not in principle fundamentally different from the way that academic articles such as this one organize themselves around references to the relevant literature.⁶

The practice of citation, academic or judicial, serves several purposes. Firstly, citations are used to demonstrate a basic knowledge of the relevant subject matter. If one were writing a piece on Canadian federalism, political scientists would expect the bibliography to include the standard articles by people like Alan Cairns and Don Smiley. Similarly, if a judge were to deliver a judgment in a case involving the custodial issues after the break-up of a marriage, judges would expect it to include a reference to the obvious cases like *Moge v. Moge*,⁷ just as a case on the standards of appellate review would normally make reference to cases like *Lensen v. Lensen*⁸ or (for administrative tribunals) to *CUPE v. New Brunswick*.⁹ As Shapiro suggests,¹⁰ this constant reiteration serves a double purpose: first, it enhances certainty by making certain sequences or blocks of citation the clearly beaten path of legal doctrine; and second, it highlights error or innovation by making it easy to identify when the standard sequence is broken or altered.

Secondly, citations are used to locate the immediate analysis in the context of established principles and standards. In an academic article, one locates oneself by indicating basic agreement or disagreement, or by suggesting that certain arguments or statements go too far or not far enough. Similarly, judges distinguish past decisions to show how far (but no further) a legal principle should be extended, or they clarify ambiguities or incompletenesses from prior decisions, or they try to resolve apparent (or real) disagreements or divergences within the existing case law, or they try to pull a variety of sources together for an original and creative synthesis. Terrell¹¹ has suggested that we can think of each judicial decision as possessing a specific location on a multi-dimensional grid. From this, it follows that the way that the immediate “point” links to an indicated string of prior decisions suggests not just location but also direction, a vector along which the law is developing on a specific point over a period of

⁵ H.P. Glenn, “The Common Law in Canada” (1995) 74 Can. Bar Rev. 261 esp. at 268 ff.

⁶ I suspect it is also true that academic writers seek to persuade the reader that their’s is a plausible approach that contributes to a deeper understanding of a broader topic, while judges seek to convince the reader that their’s is the correct resolution of the issue; this is also an important difference, but not one that undermines the point that is being made here.

⁷ [1992] 3 S.C.R. 813.

⁸ [1987] 2 S.C.R. 672.

⁹ *CUPE, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

¹⁰ M. Shapiro, “Toward a Theory of *Stare Decisis*” (1972) 1 J.L.S. 125.

¹¹ T.P. Terrell, “Flatlaw: An Essay on the Dimensions of Legal Reasoning” (1984) 72 Cal. L.Rev. 288.

time. One purpose of citation (academic or judicial) is to send this line in a desired direction.

Thirdly, citations are used to add weight and credibility to the explanations that are being advanced, making them more convincing and therefore more acceptable to the relevant public. This paper is making an argument about the utility of understanding courts by studying their judicial citation patterns; presumably the credibility of this suggestion is enhanced by the fact that it has been made by scholars like Merryman¹² and Caldeira¹³ and Johnson¹⁴ and Glenn¹⁵ in professional journals as distinguished as the *Stanford Law Review*, the *California Law Review*, the *American Political Science Review*, and the *Canadian Bar Review*. Similarly, a judge enhances the persuasiveness of his reasoning by building it around the comments that have been made in earlier cases of the Supreme Court itself — and arguably (although this is perhaps a little more debatable) this is all the more true of the comments of particularly distinguished members of that Court, such as Laskin or Dickson.

Fourthly, by placing so much reliance on the authority of past decision of the Court, the reasons in the immediate case establish themselves as an authoritative guide to the future actions of the Court itself. Because the *ratio decidendi* of Supreme Court decisions is binding on all “lower courts” (and because all other Canadian courts are by definition “lower”) it follows that the predictive capacity created by this decision applies very broadly. Indeed, to put it crudely, it is only because of this powerful shadow cast forward by the decision that anybody other than the immediate parties cares about the decision at all. The more weight that the Supreme Court itself attaches to the authority of its prior decisions, the more attention we are directed to pay to the minutest logical details of the immediate decision; the more ready the Supreme Court is to treat such precedent lightly, the less precedential authority it is creating at the present moment.

But even this is understating the case. It may be standard academic practice to recognize and acknowledge intellectual sources, but *stare decisis* is a much stronger doctrine with much sharper teeth, and there is no academic equivalent to the notion of “binding precedent.” Nor is it simply a question of some bland general principle that writers are always happy to benefit from the examination of good ideas wherever they might find them; academics cite *sources* but judges cite *authority*. To some extent, weaker perhaps in recent years but nonetheless important, the fact of a prior decision by a court of relevant jurisdiction is in itself

¹² J.H. Merryman, *supra* note 4 and “Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970: A Study of State Supreme Courts” (1977) 50 S. Cal. L.Rev. 381.

¹³ G.A. Caldeira, “The Transmission of Legal Precedent” (1985) 79 Am. Pol. Sc. Rev. 178.

¹⁴ C.A. Johnson, “Citations to Authority in [U.S.] Supreme Court Opinions” (1985) 7 L. & Pol. 509; and “Follow-up Citations in the U.S. Supreme Court” (1986) 39 West. Pol. Q. 538.

¹⁵ *Supra* note 5.

a reason for following the precedent, completely apart from the persuasive train of logic that it contains. In Shauer's words: "The bare skeleton of an appeal to precedent is easily stated: The previous treatment of occurrence X in manner Y constitutes, *solely because of its historical pedigree*, a reason for treating X in manner Y if and when X again occurs."¹⁶ Judges do not cite other cases just because they like the reasons, and casually ignore them if they do not; if I as an academic come across some tangentially relevant journal article that I think perverse or wrongheaded, I can gleefully say so in a footnote, but a judge who is similarly unpersuaded by an earlier case faces a much larger dilemma. This is why, for example, the Alberta Court of Appeal normally sits with three-judge panels, but it will convene a five-judge panel if a lawyer is asking them to reconsider and possibly overturn the precedent established by an earlier decision of the Court.

But all this just makes even more curious the phenomenon that will be explored in this paper: the citation of sets of reasons from prior Supreme Court cases that did not themselves constitute the reasons of the majority. This is particularly problematic when these reasons are cited as authority contributing to the explanation of the immediate decision, or at least cited in ways that are indistinguishable from the references that are being made to actual decisions. To cite (and, even more so, to quote) the dissent but not the decision is almost to say "I am persuaded by the reasons in the dissent more than the decision." But what does this say about the role of the judge and the nature of authority?

What difference does it make if cases are cited for minority as opposed to majority reasons? Let me illustrate by using an undramatic example. *Johnson v. Attorney-General of Alberta*¹⁷ is one of the few decisions of the Rinfret Court that continues to be cited today. The case involved *The Slot Machine Act*, an Alberta statute empowering the police to confiscate slot machines, and the central issue was whether the *Act* was valid provincial legislation or an unconstitutional infringement of federal Parliament's exclusive jurisdiction over the criminal law. A seven judge panel delivered five different reasons, with six of the judges indicating that the issue was whether or not the provincial statute was "criminal" law on the then-current constitutional definition and dividing three-three on the matter. Rand saw the issue quite differently, finding that the "clear duplication" between the provincial statute and the *Criminal Code* would "introduce an interference" with the administration of justice such that the provincial statute is "rendered inoperative." This is the early post-war Supreme Court at its most frustrating — three judges are engaged on each side of a transparently important issue, they raise all the important elements but differ on how to resolve them, writing more sets of reasons than strictly necessary in the process, and the tie is broken by a seventh judge who takes a completely different tack and simply ignores the aspects of the case that preoccupied his colleagues.

¹⁶ F. Shauer, "Precedent" (1987) 39 Stan.L.Rev. 571. (Emphasis in original).

¹⁷ [1954] S.C.R.127.

But when the case began to be cited again (after twenty years of invisibility) in the late 1970s, it was to support the proposition that the regulation of gaming activity has a clear provincial aspect, even though it can also be addressed by federal criminal legislation.¹⁸ This is perplexing because every judge but one on the panel seems to have assumed that the critical question was whether or not the impugned act takes the form of a criminal statute; if it does, it is invalid (as three judges found) and if it does not, it is valid (as three other judges found). Mr. Justice Locke (surely the most plausible candidate for the leading decision for the result, since his reasons have more signatures than anyone else supporting the successful outcome) says exactly the opposite of the modern meaning of the case, declaring that “the exclusive jurisdiction to legislate in relation to gaming lies with Parliament.” The only judge dealing with the matter as overlapping jurisdiction subject to federal paramountcy was Rand, but not one of his six colleagues explicitly agreed with him. To shift from the reasons of “a majority of a majority” to an outlying separate concurrence is fundamentally to alter the nature of the holding, and in the process to alter the history of the judicially defined meaning of the constitution of Canada.

To be sure, this is not a major case, and the Court’s rather casual abandonment of federal exclusivity in criminal law in favour of a permissive *de facto* concurrency is a long-standing preference that can be grounded in a score of other decisions as well. And the identification of “majority” and “separate” reasons is unusually difficult because the case almost reads like a *seriatim* decision¹⁹ rather than the more modern style of a clear central set of reasons with outliers reacting to it and locating themselves in reference to it. But the example does illustrate my basic point: even when judges agree on the outcome they can do so for very different reasons that carry quite different implications for the evolution of Canadian law. This being the case, it often makes a significant difference whether we let the original panel make the decision as to which set of reasons carries the greatest weight (by their votes and signatures at the time, constituting a majority and possibly creating separately-writing outliers), or whether we revisit the matter years or decades later to resurrect and privilege the reasons of the “also-ran’s” of the earlier day. There is nothing wrong with having second thoughts, but what does it imply for the doctrine of precedent?

¹⁸ For example and most recently: in *R. v. Furtney*, [1991] 3 S.C.R. 89.

¹⁹ *Seriatim* (“one after the other”) decisions have two central characteristics: first, every judge (or almost every judge) on the panel writes independent reasons, these being summed as “votes” for or against the appeal to generate an outcome; and second, none of the sets of reasons makes any direct reference to any of the others, let alone positioning itself in relation to some specifically identified leading set of reasons. This type of judgment used to be fairly common, but the practice virtually vanished during the Kerwin Chief Justiceship; I believe the Supreme Court’s last *seriatim* decision was *Hossack v. Hertz*, [1966] S.C.R. 28, handed down on 14 October 1965. During the period considered here, there were 188 citations of named individuals involved in *seriatim* decisions; these have not been included in the database, for the obvious reason that there is no clear decision with which one could separately concur.

III. *How frequently are minority opinions cited?*

Obviously, the less frequently minority reasons are cited, the less there is to explain about its impact and its implications, so the first question to be answered is: how often are minority reasons cited, and what are the trends? There are three important generalizations that can be made about the Supreme Court's citation of its own prior reasons in general, and about its citation of prior minority reasons in particular, during the second half of the twentieth century. All three are demonstrated in the clearest terms by Table 1, which tracks the extent of both sets of citations through the six Chief Justiceships²⁰ of the last fifty years.

Table 1: Frequency of citation of minority opinions, by Chief Justiceship
Reported Decisions of the Supreme Court of Canada 1949-1999

Chief Justice	All citations of SCC decisions	Citations of minority reasons	Minority cites as % of all cites
Rinfret (1949-54)	680	46	6.8%
Kerwin (1954-63)	1,026	46	4.5%
TCF (1963-73)	1,480	81	5.5%
Laskin (1973-84)	3,564	303	8.5%
Dickson (1984-90)	3,298	353	10.7%
Lamer (1990-99)	8,981	753	8.4%
Total:	19029	1582	8.3%

The *first* generalization is that the Supreme Court of Canada cites itself much more often than it used to. The number of such citations has risen from about 140 per year for the Rinfret Court, to almost 1000 per year for the Lamer Court. This is somewhat offset by the fact that citations to Supreme Court cases now account for 55% of all citations to judicial authority, compared with only

²⁰ In point of fact, of course, there were actually eight Chief Justiceships, but the three center ones — Taschereau, Cartwright and Fauteux — passed in such quick succession as to last barely a decade, which makes it more useful for immediate purposes to combine them into a single composite Chief Justiceship.

some 20% for the Rinfret Court, so the overall rate of increase in judicial citations is not quite this dramatic. But this does create a context that is akin to the economic phenomenon of inflation: if Supreme Court cases are cited seven times as often, then the value of any specific judicial citation, expressed as some sort of "percentage of the authority sufficient to carry a decision of the Court" has necessarily gone down.

There is more involved here than the simple fact that the later numbers are larger. As Gilmore has pointed out, in important ways the "information age" is transforming the practice of judicial citation and the nature of precedent, because it is flooding the courts with more recent citations from more courts than ever before, even while the pervasive ubiquity of change undermines the notion of "landmark" decisions which settle points of law for decades or centuries.²¹ In one sense, *stare decisis* is alive and well because more precedents are being cited than ever before; but in another sense, the practice is being transformed from within by what Katsch has described as "the erosion of precedent"²² and Postman as "precedent overload."²³ This qualifies, but does not obliterate, the arguments that follow.

Second: the relative frequency with which minority opinions are cited has remained considerably more constant — they have comprised about 8% of all Supreme Court citations, never less than half that much and never more than half again that much. This continuity is quite a striking development, and it strongly suggests something in the nature of an informal convention about the extent to which these citations are appropriate within reasons for judgement. (Perhaps no more than a curious coincidence, but one that puts the number in a useful comparative context — the number of citations of minority reasons has been running roughly parallel to the number of citations of American authority over the entire period as well.²⁴) Minority citations have not been swamped by the increasing volume of all judicial citations, but neither have they contributed to it disproportionately.

But, *third*, putting the two together, citations of minority reasons are far more common, far more routine, occurring in a much higher proportion of decisions and reasons than ever before. 4.5% of the 1000 citations of the Supreme Court over the eight-and-two-thirds years of the Kerwin Court adds up to less than four dozen citations of minority authority in total, barely one every second month or one in every twenty cases. But 8.4% of the nearly 9000 citations of the Supreme Court over the nine-and-a-half years of the Lamer Court adds up to more than 750 citations — roughly eight per month, and more

²¹ G. Gilmore, "Legal Realism: Its Cause and Cure" (1961), 70 Yale L.J. 1037.

²² E.M. Katsch, *The Electronic Media and the Transformation of Law* (New York & Oxford: Oxford University Press, 1989).

²³ N. Postman, *Technopoly: The Surrender of Culture to Technology* (New York: Knopf, 1992).

²⁴ See P. McCormick, "The Supreme Court of Canada and American Citations 1949-1994: A Statistical Overview" (1997), 8 (2d) Supreme Court L.Rev. 527.

than one for every case for which reasons were supplied.²⁵ When he delivered the reasons for a unanimous Court in *R. v. Morgentaler*,²⁶ Mr. Justice Sopinka cited nine different minority opinions from the *Supreme Court Reports* — the number in this single decision is higher than the annual average (of 8.44) for the entire period from the end of appeals in 1949 to Laskin's appointment as Chief Justice in 1973.

But there is another important aspect to the evolving pattern as well, one that emerges only from a closer look at the minority citations, and this is shown in Table 2 which considers the rise in the frequency of citations of dissenting reasons. There is a body of opinion in the American literature which insists that the distinction between dissents and separate concurrences is irrelevant, and that both represent disagreement with the majority that is of comparable seriousness and import. On this argument, an appeal court decision consists of an outcome supported by reasons. A dissent indicates disagreement on the outcome, and therefore (of course) disagreement on the reasons as well. A separate concurrence represents agreement on the outcome but disagreement on the reasons — but this is equally significant, because the reasons are by far the more important of the two elements. As Antonin Scalia has put it, "An opinion that gets the *reasons* wrong gets *everything* wrong which it is the function of an opinion to produce."²⁷

Table 2: Citations of separate concurrences and of dissents,
by Chief Justiceship
Reported Decisions of the Supreme Court of Canada, 1949-1999

Chief Justice	All citations of minority reasons	Citations of separate concurrences	Citations of dissents
Rinfret (1949-54)	46	44	2
Kerwin (1954-63)	46	37	9
TCF (1963-73)	81	63	18
Laskin (1973-84)	303	195	108
Dickson (1984-90)	353	186	167
Lamer (1990-99)	753	377	376
Total:	1582	902	680

²⁵ That is to say: excluding the single paragraph "appeal dismissed for the reasons given in the Court below" (or more rarely, "appeal allowed for the reasons given in the dissent in the Court below") that, on my count, make up about 30% of the reported decisions of the Lamer Court.

²⁶ [1993] 3 S.C.R. 463.

²⁷ Scalia, *supra* note 3 at 33. Emphasis in original.

But the way that the Supreme Court of Canada has treated the citation of minority reasons strongly suggests that this conflation of dissent and separate concurrence is less appropriate in this country — or at least it was less appropriate until very recently. The Rinfret and Kerwin Courts each cited prior dissents of its own Court so seldom that we can almost ignore the practice — there were only eleven such citations in fourteen years. But the Laskin Court cited dissents 10 times a year, the Dickson Court 25 times a year, and the Lamer Court almost 40 times a year. The ratio between the citation of concurrences and dissents was eight to one for the Rinfret and Kerwin Courts combined, but this had swung to virtual equality by the 1990s.

The *fourth* generalization is therefore that the citation of the Court's prior dissents has recently emerged as a normal practice of the Court — not in such a way as to displace the citation of separate concurrences, but rather to take its place beside such citation as an equally legitimate source of explanation and persuasion. This is an entirely new development in Canadian law: had an analysis parallel to this one been undertaken in the 1950s, it would undoubtedly have concluded that there was a strong albeit informal convention that discouraged the citation of the dissenting reasons from the Court's own earlier cases. The erosion, and more recently the obliteration, of that convention is a phenomenon that calls for closer examination. The citation of dissents — not just in passing, but in the form of approving direct quotation — is now so common as to raise few eyebrows. La Forest's reasons for a unanimous Court in *Eldridge v. British Columbia*²⁸ drew on no less than five Supreme Court dissents, as did L'Heureux-Dubé's reasons in *R. v. O'Connor*.²⁹ Wilson's majority reasons in *Lavigne v. Ontario Public Service Employees Union*,³⁰ and Lamer's in *R. v. Robinson*,³¹ each built on the citation and discussion of four dissents. This is as many dissents cited in only four decisions as the entire Supreme Court cited in the first two decades after the abolition of appeals to the Judicial Committee.

The combination of these four general tendencies has created a unique circumstance that applies at least to the Lamer Court, and possibly to the modern Supreme Court of Canada more generally. It is now the case, and it was not the case twenty years ago, that the Supreme Court frequently cites not just its own decisions but also its own prior separate concurrences and even its own prior dissents — and when they are cited, it is often in ways that are indistinguishable from the citation of judicial authority in the form of prior decisions. We should not overstate this frequency; the citation ratio of decisions to concurrences to dissents is about 18:1:1. At least in recent years on the Court, the actual ratio of decisions to concurrences to dissents is closer to 3:1:1 (or 2:1:1 if we exclude single-paragraph dismissals "for the reasons given in the Court below."), and this suggests that the attrition rate for separate opinions is very high — most of

²⁸ [1997] 3 S.C.R. 624.

²⁹ [1995] 4 S.C.R. 411.

³⁰ [1991] 2 S.C.R. 211.

³¹ [1996] 1 S.C.R. 683.

them are never referred to again. But if one in ten is not an overwhelming number, it is not an insignificant number either, and I would suggest that it is high enough to call for further consideration.

IV. Minority opinions: who does the citing?

If the increase in the frequency of citations of minority opinions is a relatively recent phenomenon, then it necessarily follows that the people who do the most citing of such reasons are the recent members of the Court; but it is still useful to identify which specific judges are the most prepared to turn to this particular source of ideas and arguments, as well as which of the earlier members of the Court are the forerunners of this current practice. This information is gathered in Table 3, which further breaks down the citation of minority opinions into separate concurrences and dissents. The table lists every member of the Court who cited at least 20 minority opinions during their service on the Court, a criterion which includes almost exactly one-half of the 39 judges who served on the Court between 1949 and 1999.

Table 3: Frequency with which specific judges cite minority opinions
Reported Supreme Court of Canada decisions 1949-1999

Judge	Cited dissents	Cited Concurrences	Cited Minority Opinions
L'Heureux-Dubé	112	80	192
Lamer	71	62	133
La Forest	53	75	128
Dickson	45	70	115
Sopinka	53	58	111
Wilson	59	46	105
McLachlin	33	42	75
Laskin	22	37	59
W.Z.Estey	20	36	56
Cory	21	30	51
Iacobucci	22	26	48
Pigeon	10	36	46
Spence	12	31	43
Ritchie	8	30	38
McIntyre	14	22	36
Martland	14	21	35
Gonthier	14	17	31
Beetz	7	17	24
LeDain	10	10	20

The table is indeed dominated by relatively recent judges — mostly from the Lamer Court, with some from the Dickson Court as well. We can perhaps get a better feeling for what is going on if we look at this in terms of how many times each judge cites minority reasons each year of their tenure on the bench. (Otherwise, we would tend to think of Lamer, Dickson, Sopinka and Wilson as all citing such opinions with comparable frequency, when in fact Sopinka and Wilson served for less than ten years each, Lamer and Dickson for almost twice as long.) In these terms, we have a handful of “frequent citers” of minority opinions, these being L’Heureux-Dubé (15.4 per year), Sopinka (11.7), Wilson (11.7), and La Forest (10.2). And we also have a slightly higher number of “moderate citers” of minority opinions, these being McLachlin (7.3), Lamer (6.9), Dickson (6.7), Iacobucci (5.6), W.Z. Estey (5.3), Cory (4.9), LeDain (4.4), De Grandpré (4.3) and Laskin (4.2). All the other judges who have served on the Supreme Court of Canada are “low” (below twice per year) or “very low” (below once per year) citers of minority opinions.

These lists of names and numbers can easily be turned into a story of the Court’s evolving decision-explaining practices. The dramatic jump in minority reason citation after 1975 coincides with the arrival on the Court of a block of five judges (Laskin, Dickson, De Grandpré, W.Z. Estey and Lamer), all appointed between 1970 and 1980. We can fairly think of them as the first fruits of Trudeau’s dramatic transformation of the professional credentials of the typical Supreme Court appointee.³² They jointly create a deciding-and-explaining judicial community in which the moderate citation of minority opinions is acceptable, even at a level well above the previous practice of the Court. I take it that the significance lies in the group, not in any single individual acting on his own; Laskin, the first of the five to be appointed, used minority citations very rarely (only twice a year) in his first four years on the bench, the frequency tripling when Dickson and de Grandpré joined him.

The pattern shifted again with the appointment between 1982 and 1988 of a further block of five judges, including one “moderate” citer (LeDain) who fits smoothly into the Laskin/Dickson style, and four extremely frequent citers (Wilson, La Forest, L’Heureux-Dubé and Sopinka) who are prepared to accept a historically high citation rate of these materials. Minority citations were used more frequently in the 1970s than they ever had been before, and by a broad cross-section of the members of the Court; but in the 1980s these established members were easily surpassed by their new colleagues. As a result, the citation of minority opinions rose to much higher levels, peaking at 143 in the single term that began in September 1990 — this on a Court that had averaged only 20 such citations per year over the previous forty years. But the increase stopped,

³² See e.g. J.G. Snell and F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society & University of Toronto Press, 1985) at 236: the Trudeau appointees were “the most learned and scholarly group of justices ever to join the Supreme Court.” cf P. McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Co., 2000) at 85-6 & 108.

and even modestly reversed itself, toward the end of the 1990s. The judges appointed in this period were either moderate citers (Cory, McLachlin and Iacobucci) or infrequent citers (Major, Gonthier) of minority opinions. Extrapolating from their limited service on the bench, both Bastarache and Binnie seem to be moderate citers as well, around the same level as McLachlin. It seems reasonable to assume that the citation of minority opinions by the McLachlin Court will not be as frequent as the Lamer Court, but will still remain at or above the levels of the Dickson Court. (This is not, of course, to deny that there has through the entire period been a subset of judges — Beetz and Chouinard in the 1980s, Major and Gonthier in the 1990s — who rarely use minority citations, but they are no longer typical of the Court.)

Why the jump in minority citation frequency? One answer might be the arrival of the academic judges. Although academics and judges alike draw heavily on citations to the works of others to contribute to a written opus, there are nonetheless significant differences in the way that they understand and use those citations. Judges are seeking truth — the correct outcome to the immediate case, and the correct statement of statutory interpretation or legal doctrine that will explain the necessity of that outcome — and they use citations as references to an authority that has a permanence transcending the personal preferences of judges or critics. As well, judicial citation often occurs in the context of hierarchy — some voices have more authority than others because they are the voices of courts to which the decisions of other courts can be appealed — although it is important to notice that the common law is more a “conversation of equals” than a “yes, sir” of hierarchical subservience, and even the citation of a “lower” court decision is normally treated as an example of authority.³³

Academics, on the other hand, are often looking for interesting perspectives or penetrating insights, and they are more willing than judges to perform thought experiments or to pursue an analogy or a line of thought just to see where it will take them. In such pursuit, they are willing to use a pretty fine net and to cast it very wide, drawing inspiration or illustration from a wide variety of sources; and (unlike judges) they are also accustomed to criticizing some or all of their sources with a judgmental negativity that is alien to judges. (Citation being an acknowledgment of genuine authority, the judicial style is much more reverential and deferential; the normal way to “criticize” an unsuitable or dubious decision is simply not to cite it.) For academics, there is no better hunting ground for the nuggets around which to build a current investigation than in the discarded theories of yesterday. Nor do they deal with authorities in anything like the same way; there is no academic equivalent to the appellate hierarchy, no academic journal that carries the authoritative weight of the *Supreme Court Reports*, no academic counterpart to *stare decisis*.

³³ See Glenn, *supra* note 5.

This is not to deny that the judges from these academic backgrounds were judges first and academics second, but only to suggest that it contributed to a difference in style that may have contributed to a difference in content. Judges use citations like stone-masons use rock, finding the pieces that will fit precisely together to create a solid structure. Academics use citations like someone browsing through a second-hand store, picking up object after object in a search for beauty but expecting to be frequently disappointed by apparent treasures that turn out on closer examination to be badly flawed.

Also significant is the change in audience. Unlike the earlier court, which seems to have addressed itself purely to other judges and lawyers, the Laskin Court and its successors have been reaching out to a broader audience — some vaguely defined informed lay public. This leads to a more expansive explanatory style, and to the use of a wider variety of sources appealing to a variety of experiences and sensibilities — such as the increasing citation of books and articles (including those by still-living authors³⁴). For myself, I see this as working through an early sparse awkwardness in the Laskin Court, to a sometimes lapidary clarity in the Dickson Court, to a frequently overblown discursiveness in the Lamer Court, but I concede this is a matter of taste and others might load the descriptions in different ways. At any rate, the new style and the new audience call for new devices in the art of persuasion, and one of the elements that is used with increasing readiness is the frequently sympathetic discussion of ideas that the Court had earlier rejected in its own minority opinions.

V. Minority opinions: who is cited?

Just as many decisions are such as never to be cited as authority, so many separate reasons are never again referred to in the course of a Supreme Court judgment. To move this comment to a slightly higher level of generality: there are some judges who are frequently cited, and others who are very rarely cited, for the ideas and arguments that they have expressed through the vehicle of separate reasons. Table 4 indicates the “top dozen” (actually, given the three-way tie for eleventh, the top thirteen) of the Supreme Court of Canada, measured on the criterion of how often they have been cited for ideas other than those contained in a decision for the Court.

³⁴ See McCormick, “Do Judges Read Books, Too?: Academic Citations by the Lamer Court 1991-6” (1998), 9 Supreme Court L.R. (2d) 463.

Table 4: Judges most frequently cited for their minority opinions
Reported Decisions of the Supreme Court of Canada 1949-1999

Judge	Dissents cited	Concurrences cited	Total times cited
Lamer	91	46	137
Wilson	57	61	118
La Forest	35	81	116
L'Heureux-Dubé	74	29	103
Dickson	68	34	102
Rand	4	88	92
Laskin	71	20	91
Duff	10	75	85
Cartwright	18	45	63
LeDain	38	4	42
McLachlin	13	23	41
McIntyre	7	34	41
Kerwin	6	35	41

The full table, of course, would have been rather larger. Of the 65 judges who have served on the Court in the twentieth century,³⁵ fifty-one were subsequently cited for their minority reasons, although six were only cited on a single occasion and another eight were cited six times or less. But the focus on the very top end of this lengthy list is fully appropriate: the thirteen judges included in the table account for more than two thirds (68.0%) of all the citations to minority opinion that occurred between the end of appeals in 1949 and the end of the 1998-9 term. Since some judges are cited so much more often than others, it is important to know who the frequently cited judges are.

Although (as noted above) this is a distinction of historic rather than current relevance, there are some judges (Rand, Duff, La Forest) who are cited most often for their concurrences; and there are others (Lamer, L'Heureux-Dubé, Laskin and Dickson) who are cited most often for their dissents. Wilson is the only one who is cited equally often for both. Although dissents have become somewhat less frequent on the Court in recent years, it is only recently that they have come to be cited with a frequency that is comparable to separate concurrences.

Not surprisingly, the list of the judges most frequently cited for their separate opinions largely parallels the list of the judges who are most frequently cited for their decisions. If one were asked to generate a pantheon of the great

³⁵ Closing the century slightly prematurely at the end of the 1998/9 term, and therefore not including Madame Justice Arbour in the count.

judges who served on the Supreme Court of Canada, one would surely include Dickson, Lamer and Laskin (the last three Chief Justices), and probably La Forest and Wilson as well. Duff's once-stellar reputation has been treated more skeptically in recent years, but it would still be reasonable to put him on this list as well. These six judges are in the top eight for the citation frequency of both their minority opinions and their decisions, as shown in Table 5. To a large extent, then, judges are cited for their minority opinions for the same reason that they are cited for their decisions — because they are the members of the Court who have made the most distinguished contribution to Canadian jurisprudence, and their ideas and comments (even when they are not delivered for the majority) are therefore worth returning to for a further exploration of their insights and their knowledge.

Table 5: Rankings of judges for frequency of citation, decisions
& minority reasons
Reported Decisions of the Supreme Court of Canada 1949-1999

Judge	Ranking for citations of minority reasons	Ranking for citations of decisions
Lamer	1 st	2 nd
Wilson	2 nd	7 th
La Forest	3 rd	3 rd
L'Heureux-Dubé	4 th	21 st
Dickson	5 th	1 st
Rand	6 th	24 th
Laskin	7 th	6 th
Duff	8 th	4 th
Cartwright	9 th	11 th
Le Dain	10 th	27 th
McIntyre	11 th	9 th
Sopinka	14 th	5 th
Ritchie	23 rd	10 th
Martland	24 th	8 th

But the information in Table 5 is more interesting for identifying the judges who do not enjoy comparable stature on both lists. Clearly, there are some judges who are relatively better known and more strongly remembered for their separate opinions than for the decisions they wrote for the Court — this would include, most obviously, L'Heureux-Dubé, Rand and Le Dain. Conversely, there are some judges who are frequently cited for their decisions but much less often remembered for their separate opinions, and this sub-list would be headed by Sopinka, Martland and Ritchie.

We can put the discussion on slightly broader grounds. Over the fifty year period, citations to minority opinions have constituted just over 8% of all citations to Supreme Court cases. This comment about Supreme Court citations in general can be turned into a question about citations to individual judges in particular — which of the judges are particularly dependent upon citations to their minority opinions as a vehicle for the transmission of their ideas? Limiting consideration to the 34 Supreme Court justice whose reasons (for the majority or for themselves) have been cited at least 100 times, there are only four for whom minority opinion citations make up 20% or more of their total citations, and those include the three indicated above — Rand (28.5%), L'Heureux-Dubé (27.9%), Kellock (22.2%) and Le Dain (19.8%). All four can be described very much in parallel terms — they tended to be outliers on their own Court, delivering less than their notional one-ninth share of the Court's decisions, and frequently writing in dissent or separate concurrence to express their own rather different "take" on the legal issues of their day. The generalization is perhaps least apt for Le Dain, who was on the "outside" of the Dickson Court but rather less ready than the other three to write on his own. His appearance on the list is largely the product of a single frequently cited dissent — in *R. v. Therens*³⁶ — which has had a disproportionate statistical impact on a judicial career that lasted only four and a half years.

Conversely, there are a number of the 34 reasonably frequently cited judges for whom references to minority opinions make up a considerably smaller than average proportion of all references to their delivered reasons, most notably Martland (3.3%), Ritchie (3.2%), Judson (2.5%), Fauteux (2.4%) and Iacobucci (2.7%). The same observations can be made of all five: they tended to be part of the decision-delivering dominant block for most of their service on the Court, a fact which carried with it the double consequence that they wrote more than their notional one-ninth share of the decisions, and that they rather infrequently found themselves in the position of writing minority views. The contributions that these individuals have made and are making to Canadian jurisprudence are almost entirely drawn from their decisions.

There is also a further sub-text that should perhaps be identified, and this is the fact that Martland, Ritchie and Judson were the (mildly infamous) trio of Diefenbaker appointees who very much set the course of the Supreme Court for about fifteen years, and Fauteux was one of their most reliable allies; the judicial gutting of Diefenbaker's statutory Bill of Rights is perhaps their most dramatic and lasting achievement. When their hold on the Court was broken (this taking place either in 1979 with the appointment of Chouinard, or in 1980 with the appointment of Lamer), the Court underwent a rather rapid swing from the traditional "formalist" style to the new "contextual" style for the interpretation

³⁶ [1985] 1 S.C.R. 613. Madame Justice L'Heureux-Dubé has described this case as "a true imbroglio" such that "[a] roadmap is required to read this case." See C. L'Heureux-Dubé, "The Length and Plurality of Supreme Court of Canada Decisions" (1990) 28 *Alta. L.Rev.* 581 at 587.

of statutory and constitutional provisions alike, a jurisprudential revolution of no small import. The consequence is very much to contain the enduring impact of the Martland-led block — so much so that even an oblique reference (“reminiscent of *Wray*”) is a dissenter’s rebuke stinging enough to detach one of the majority judges to write a focused rebuttal.³⁷ The flip-side of this impact of an interpretive revolution is arguably the reputational rehabilitation of Rand, whose discordant voice on the Rinfret and Kerwin Courts made his a marginal presence at the time but much more congenial to the modern style.

VI. *Citing minority opinions: the phenomenon of self-citation*

There are six members of the Supreme Court who cited minority reasons more than 100 times, those six being L’Heureux-Dubé, Lamer, La Forest, Dickson, Sopinka, and Wilson. And there are five members of the Court whose minority opinions were cited more than 100 times, those five being Lamer, Wilson, La Forest, L’Heureux-Dubé and Dickson. But (with the single exception of Sopinka) these are the same individuals. It may be that they are citing each other — that they collectively represent a pool of initially unsuccessful but subsequently fruitful ideas on which they all subsequently draw. Or it may be that there are simply citing themselves, and this is a horse of quite a different colour.

If we were talking about a judge citing a prior decision for the Court, it would make no difference how many of those citations were to decisions that she had written herself — because the decision of the Court is, transparently, a binding authority to which all members of the Court (including the author) must subsequently make appropriate reference. If a judge delivers what is clearly a landmark decision for the Court (say, Dickson’s *Oakes* for Section 1 issues; L’Heureux-Dubé’s *Moge v. Moge* for family law matters; Lamer’s *van der Peet* trilogy for aboriginal rights, Sopinka’s *Stinchcombe* on the right to full reply), then any subsequent decision, by that judge or any other, that deals even tangentially with that subject matter will necessarily and appropriately draw on that critical precedent. Decisions carry the authority of the Court, an *imprimatur* more important by far than the relatively incidental issue of whose name they appear under.

But the citation of minority opinions is a different matter altogether. For a judge who is completely convinced of the majority’s error in a specific case to put that conviction “on the record” is of course appropriate. But, the decision delivered, that dissenting viewpoint on outcome or reasons or both vanishes behind the precedential authority of the decision itself. For the same judge to cite the dissent (and especially to do so when again in disagreement with the majority) is surely behavior bordering on judicial insubordination. It implicitly

³⁷ The reference is to *R. v. Burlingham*, [1995] 2 S.C.R. 206, a case dealing with the exclusion of evidence, with L’Heureux-Dubé writing the angry dissent and Sopinka the annoyed response.

(and sometimes explicitly) treats a decision as if it did not actually decide anything.

Indeed, an uneasiness about such a process sometimes emerges on the record. Consider, for example, Dickson's dissent in *R. v. Wetmore*,³⁸ following on his separate reasons in Canada (A.-G.) *Canadian National Transportation*³⁹ delivered (by an identical panel) earlier on the same day. Both cases dealt with the prosecution power under the constitutional division of powers, and both reflected Dickson's serious reservations about the version of legal history on which the majority had drawn. But *Wetmore* also includes a curious short separate concurrence co-authored (unusually) by Beetz and Lamer, who had briefly (in parallel separate reasons) agreed with Dickson in the earlier decision but now are concurring with Chief Justice Laskin because "[w]e feel bound by the majority judgment" in *C.N. Transportation*.⁴⁰ I read this as a slightly pointed criticism of Dickson — that is, "we feel bound and you should, too." To compound his insubordination, Dickson further said that he "remain[ed] unshaken in the view I expressed" in an even earlier dissent in *R. v. Hauser*, added that he "cannot accept" the majority's reading of the Confederation agreement, and he wound up his argument insisting that it was necessary to repudiate "blind centralism."⁴¹

As disagreements go, this is unusually pointed stuff, but it just lays bare the problem that is posed by repeated disagreement and highlighted by self-referencing. Disagreement itself implicitly undermines the authority of the decision, and this is why the American Canon of Judicial Conduct discourages it; but it is a modest degree of subversion and it is normally contained by the appropriately ritualistic terminology ("with respect...."). Repeated disagreement, however, implies a settled recalcitrance that approaches insubordination. Under unusual circumstances, this principled personal reticence may be commendable — the American examples that tend to be praised are Holmes's persistent criticism of substantive due process, Black and Douglas's absolutist views on the first amendment, and Brennan and Marshall's unrelenting opposition to the death penalty⁴² — but the point is that the circumstances that render repeated dissent fully acceptable are unusual. The routinization of persisting disagreement represents another phenomenon altogether.

³⁸ [1983] 2 S.C.R. 284.

³⁹ [1983] 2 S.C.R. 206.

⁴⁰ *Supra* note 30 at 309; [1979] 1 S.C.R. 984.

⁴¹ *Supra* note 38 at 305-07.

⁴² See at W.J. Brennan Jr., "In Defense of Dissents" (1986) 37 *Hastings L.J.* 427 at 436-7.

Table 6: Judges most often cited for minority opinions,
excluding self citations
Reported Decisions of the Supreme Court of Canada, 1949-1999

Name of Judge	Total citations of their minority reasons	Self citations of minority reasons	Citations of their minority reasons excluding self citations
Lamer	137	36	101
Rand	92	0	92
Wilson	118	31	87
Dickson	102	16	86
Duff	85	0	85
Laskin	91	8	83
La Forest	116	39	77
Cartwright	63	0	63
McIntyre	41	1	40
LeDain	42	3	39
Kerwin	41	2	39
L'Heureux-Dubé	103	67	36

This being the case, it is an important question whether the frequent citers of minority opinions are citing each other or citing themselves. This is assessed by Table 6, which regenerates the figures for Table 4 (identifying the judges most frequently cited for their minority opinions) by omitting all self-citations, and the impact of this recalculation is significant. For one thing, instead of five judges who have been cited for their minority opinions more than 100 times, there is only a single judge (Lamer) who barely surpasses this figure. And the "top five" list has been significantly altered, with two of the recent judges (L'Heureux-Dubé and La Forest) dropping off to be replaced by two of the leading figures from the earlier decades of the Supreme Court's history — Duff and Rand.

The reason for my preoccupation with "league tables" and relative levels of citation (other than self-citation) is because I read such citation as an important measure of judicial influence.⁴³ On the part of the cited judge, it represents influence projected forward into the subsequent considerations of the Court; on the part of the citing judge, it represents the profound compliment of an acknowledgment of this influence. In both cases it is all the more striking because it represents an influence that comes through despite the fact that it transparently constitutes a set of ideas that the majority of the Court could have endorsed, but consciously and deliberately chose not to. But self-citation muddies the signal that I am trying to decode — in such cases, it represents either the self-conscious and persisting marginalization of a principled outlier, or possibly the stubborn peevishness of a "sore loser."

⁴³ See e.g. D. Klein & D. Morrisroe, "The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals" (1999) 28 J.L.S. 371 at 375. "Citations have been viewed alternately as indicators of prestige, influence, or, perhaps, both."

The range of numbers for self-citations in Table 6 is extreme enough—from several dozen all the way down to zero—that it calls for a closer look at this phenomenon. Over the five decades, there were 259⁴⁴ examples of self-citation for minority opinions, accounting for 17.2% of all citations of minority reasons. Twenty of the 39 judges who served on the Supreme Court over the fifty-year period made no self-references to minority opinions at all; three others made only a single such reference; another half dozen made two or three. But there were seven judges who made it into double figures, and a handful who cited their own minority reasons three dozen times or more.

Overall, self-citations account for 17.2% of all minority citations but, as is clear from the sequencing of the names in Table 7, and as has been true of many aspects of the phenomenon examined in this paper, this activity is concentrated within the practices of a small number of the relatively recent members of the Court. For the entire 35-year period up to the beginning of the Dickson Court, self-citations made up only 6.6% of all minority citations; this rose to 17.9% for the Dickson Court, and to 23.2% for the Lamer Court. If “second thoughts” is the rubric that I have chosen for the general phenomenon, implying a reconsideration of the Court’s minority opinions several years after the fact, then “self-vindication” seems the more appropriate label for a substantial block of the more recent references.

Table 7: Citation of Minority Opinions: Relative frequency of self-citation
Reported Decisions of the Supreme Court of Canada 1949-1999

Judge	All citations of minority opinions	Self-citations of minority opinions	Self citations as % of all citations
L’Heureux-Dubé	103	67	65.0%
Sopinka	38	19	50.0%
La Forest	116	39	33.6%
McLachlin	41	13	31.7%
Lamer	137	36	26.3%
Wilson	118	31	26.3%
Gonthier	8	2	25.0%
Iacobucci	9	2	22.2%
Spence	26	5	19.2%
Cory	36	6	16.7%
Dickson	102	16	15.7%
Ritchie	20	2	10.0%
Laskin	91	8	8.8%
Pigeon	35	3	8.6%
LeDain	42	3	7.1%
Kerwin	41	2	4.9%

Note: no other judge made more than a single self-citation to minority reasons

⁴⁴ There was only one coding complication in this count, caused by the fact that Cory and Iacobucci co-author decisions and separate reasons to an unusual extent. “Cory and Iacobucci” cited two minority opinions by “Cory and Iacobucci” but none by “Cory” or “Iacobucci.”

It does seem to me that the frequent citation of minority opinions already represents a significant change in what the modern judiciary means by authority and precedent, one that significantly modifies — I do not say displaces or replaces — what *stare decisis* really means today. But the sub-set of self-citations raises the problem in a particularly acute form, which I would like to illustrate by looking closely at one example.

On October 13, 1990, the Supreme Court handed down a string of six concurrent decisions dealing with the concept of “constructive murder”⁴⁵ in the context of the Charter — clarifying the decision in *R. v. Vaillancourt*⁴⁶ which had first dealt with one aspect of the matter as it impacted on one specific section of the Criminal Code. The lead decision of the string was *R. v. Martineau*,⁴⁷ and in that case Chief Justice Lamer delivered the reasons for five of the judges on the seven-judge panel, pushing the central principle of *Vaillancourt*⁴⁸ (a requirement of “at least” objective foreseeability to sustain a conviction for murder) one step further by finding that the Charter required the Crown to demonstrate *subjective* foreseeability as well. The other five cases in the string⁴⁹ explore further aspects of the same issue, for example whether it applies to the charge of attempted murder as well as to murder, and different members of the five-judge majority write shorter decisions applying the *Vaillancourt* and *Martineau* ratio to these subsidiary questions.

The other two judges on the *Martineau* panel wrote separate reasons. L’Heureux-Dubé dissented strongly, insisting that the *Charter* is satisfied by requiring objective foreseeability and that this is the proper reading of *Vaillancourt*; and Sopinka, in a briefer separate concurrence, suggested more mildly that it was unnecessary to consider whether the *Vaillancourt* principle should be extended to require subjective foreseeability because the objective foreseeability test was sufficient to deal with the immediate case.

So far, so good. The provisions of the *Charter* are general enough that there can be genuine doubt as to how they apply to specific legislative provisions; and any Supreme Court decision answering such a question in one instance will necessarily leave some doubt as to whether the principle it enunciates casts wider shadows or whether the specific case marks the outer limits of its applicability. It is such doubts that make it appropriate for parties to bring these

⁴⁵ “Constructive murder” (or “felony murder”) occurs when a person causes the death of another while committing or attempting to commit one of a statutory list of serious crimes, including robbery, even should that death occur accidentally.

⁴⁶ [1987] 2 S.C.R. 636.

⁴⁷ [1990] 2 S.C.R. 633.

⁴⁸ “The ratio of *Vaillancourt*, strictly speaking, was that it is a principle of fundamental justice that before a person could be convicted of murder there must be proof beyond a reasonable doubt of at least objective foreseeability of death.” Chief Justice Lamer, in *R. v. Martineau*, *ibid.* at 643.

⁴⁹ *R. v. Rodney* [1990] 2 S.C.R. 687; *R. v. Arkell*, [1990] 2 S.C.R. 695; *R. v. Luxton*, [1990] 2 S.C.R. 711; *R. v. Logan*, [1990] 2 S.C.R. 731; *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755.

questions before the Court, and that create some general uncertainty as to which side will prevail. The same element of uncertainty is sometimes (and quite appropriately) reflected in the Court's minority opinions, as some judges indicate that they would prefer to have the uncertainty resolved in a different fashion.

Rather more problematic is the fact that both L'Heureux-Dubé and Sopinka continue to enunciate their divergent arguments in each of the five cases delivered after *Martineau*, with L'Heureux-Dubé specifically citing her *Martineau* dissent all five times and Sopinka his separate concurrence in three of the cases. Surely the point of a Supreme Court decision — especially one delivered by a solid majority of the panel, and specifically identifying its own *ratio* — is that it takes the earlier condition of uncertainty and (assuming that the decision is competently and clearly written) transforms it into certainty. Before *Martineau* we could wonder if objective foreseeability was a sufficient or only a necessary condition for sustaining a murder charge, and before *Logan* we could wonder if the same test applied to attempted murder, but *after* these decisions we are no longer in doubt. Law professors must now amend their lecture notes, and lawyers must alter the terms in which they address their arguments to trial judges and appeal courts — we now know what the law of Canada on this matter is, with more precision and specificity than we did before the decisions were handed down, and any law professor or lawyer who treats the matter as still being “in play” is committing a serious *faux pas*.

Therefore the status of the separate reasons of L'Heureux-Dubé and Sopinka in the five subsequent decisions is different from the status of their (largely similar) separate reasons in *Martineau*, because it indicates that they are refusing to accept the *Martineau* decision as having changed or clarified this legal issue. Even at the end of the string, L'Heureux-Dubé is still arguing the matter at considerable length and still citing her own minority reasons — and in a way that not only ignores the majority decision in that case but gives the completely misleading impression that her own reasons were authoritative: “For the reasons stated in *R. v. Martineau*....I am of the view that s. 213(a) of the *Criminal Code* does not violate ss. 7 and 11(d) of the Charter. In that case I found that an objective foreseeability test of death was constitutionally valid for the crime of murder, and I distinguished this Court's decision in *R. v. Vaillancourt*.”⁵⁰

Sopinka's language softens somewhat as we move through the six-case sequence, but in *R. v. Logan* he is still saying: “The majority of the Court in *R. v. Martineau* concludes that murder is a special offence requiring subjective foresight of death. In my reasons in *Martineau* I explain why it is unnecessary to determine this issue beyond applying *R. v. Vaillancourt*. Assuming that the majority in *Martineau* is correct, it would follow that subjective foresight is a constitutional requirement for attempted murder.” Note that he is acknowledging

⁵⁰ L'Heureux-Dubé, dissenting, *ibid.* at 776.

that his own reasons in *Martineau* were not the decision of the Court — but also notice the ambivalence, even the gentle subversiveness, of the phrase “assuming the majority is correct.” The decision he is referring to is not the plurality decision of a badly divided panel, but a clear statement of a united majority that held together without wavering through a string of six cases; and it even passes the “five judges signing” test that convention requires on the United States Supreme Court (but not on the Supreme Court of Canada) in order to establish precedent.⁵¹ So much for *stare decisis* in Canada in the 1990s.

To be sure, this is something of a special situation because all six decisions were handed down concurrently. It is not that the minority judges are still brooding in sullen and faintly mutinous dissent months or years later, just that in the afternoon they are still standing by what they said in the morning. Given the great value that judges in our system attach to personal consistency, this is neither inexplicable nor disreputable.⁵² But to the extent that we take Lamer and Beetz’s cryptic comments in *Wetmore* as implying a convention (and obviously I do), then L’Heureux-Dubé and Sopinka are clearly casting doubt on how we might formulate the revised convention for the Lamer Court and after. Obviously I picked this example because it makes my point so directly; I am not suggesting that all self-citation of minority reasons, let alone all citation of minority reasons as such, carries such a direct challenge to the authority of a majority decision. But I am suggesting that this is the implicit message buried in the rise of minority citation in general and self-citation in particular.

If the citation of minority reasons in general and of dissenting reasons in particular is a gradually increasing and fairly pervasive phenomenon, this is less true of self-citation. Five individual members of the Court, of the 39 who have served on the Court between its expansion to nine in 1949 and Cory’s retirement in 1999, have accounted for the bulk of this behavior, these five being L’Heureux-Dubé, Lamer, La Forest, Sopinka and Wilson. Of all the citations to minority opinions that have been made in those fifty years, these five account for fully 50%; of all the citations to dissenting opinions that have been made over the same five decades, these five account for 60%; and of all the “self-citations” to minority authority that have been made since the Second World War, these five account for 80%. By the same token, we are describing something that is temporally confined as well: the time period between January 1 1990 and December 31 1997 saw more than sixty per cent of all the self-citations to minority opinions that have occurred since 1949, including more than 70% of all self-citations to dissents.

⁵¹ See e.g. Lee Epstein & Jack Knight, “Mapping Out the Strategic Terrain: The Informational Role of *Amici Curiae*” in C.W. Clayton & H. Gillman (eds), *Supreme Court Decision-Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999) 215 at 217 fn. 10. For a more extended discussion, see M. Thurmon, “When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions” (1992) 42 Duke L. J. 419.

⁵² On the strong value of personal consistency in the Anglo-American judicial system, see e.g. R.C. Lawlor, “Personal *Stare Decisis*” (1967-68), 41 S. Cal. L.Rev. 73.

VII. Conclusion

The question that was being explored was the relative frequency of the citation by the Supreme Court of its own minority reasons, and the findings of this paper support a triple conclusion:

First: the citation of minority opinions by the Supreme Court of Canada is a phenomenon that has emerged only in the last twenty-five years, particularly the last ten. Although it is in part the product of the dramatic expansion in the overall number of judicial citations used by the Supreme Court, and especially in the number of citations to prior decisions of the Supreme Court itself, it is not reducible to (or explainable only in terms of) this expansion. It is now routine, where it used to be exceptional, for the Supreme Court to refer to reasons that were not accepted at the time by the majority of the Court, and frequently to do so in terms that are indistinguishable from references to the authority of earlier decisions. This in itself suggests a modification of the traditional understanding of *stare decisis*, and of the channels through which judicial influence is transmitted over time.

Second: the citation of dissenting opinions is arguably the most controversial aspect of the citation of minority opinions, and yet this is the category of minority opinions whose citation frequency has increased the most significantly in the post-WWII period, showing a steady growth through each successive chief justiceship. If there was once a convention that discouraged the citation of dissents, this convention has entirely disappeared; dissents are now cited as often as separate concurrences, and are frequently not transparently identified as separate opinions, let alone as dissents. This suggests a further and even more striking modification of the application of *stare decisis*, implicitly undermining the meaning and status of “decided matters.”

Third, the self-citation of minority opinions (that is: judges referring to *their own* dissenting and separately concurring reasons in prior cases) is a practice that was virtually unheard of in the immediate post-WWII Chief Justiceships. It emerged at a very modest level on the Laskin Court, and has subsequently expanded to account for almost one-quarter of all citations to minority opinion on the Lamer Court — clearly a significant feature of the recent citation of minority opinions by the Supreme Court of Canada. This is a very striking departure from traditional practices, and one that would — should it persist — call for a major rethinking of the meaning of judicial citation and the evolution of judicial doctrine. However, a closer look at this phenomenon suggests that this may be an isolated episode connected to a relatively small number of judges, rather than a new norm attributable to the Court as a whole in an ongoing way.

But cutting away from the (apparently transient) practice of self-citation simply confirms the ubiquity and the persistence of the more general phenomenon — that is to say, of the relatively frequent citation of minority opinions. 1967 is perhaps the best candidate for the watershed — and, not

coincidentally, it also marks the beginning of the "Trudeau revolution" that transformed the credentials of the typical Supreme Court appointee. Of the sixteen judges who served on or were appointed to the Court between the end of appeals to the Judicial Committee in 1949 and the beginning of the 1967 term, there was not a single individual who cited minority opinions (excluding self-citations) as often as three times a year and half of them did so less than once per year. Of the 23 judges appointed since September 1967, all but four (Beetz, Chouinard, Gonthier and Major) cite minority opinions at least three and a half times a year, and one third of them do so at least six times a year. But the "frequent citers" indicated in an earlier section are entirely an artefact of the presumably transient phenomenon of self-citation; omitting this element, no member of the Court averages more than ten citations of minority opinions per year.

For the Court as a whole, this means that before 1970, citations to minority opinions (excluding self-citations) oscillated around a long-term average of about seven per year (although there were — for example in the 1954 term — atypical "spikes" in which the number rose as high as 21). For the Laskin Court, this number suddenly tripled, rising to the mid 20's; and for the Dickson and Lamer Courts it doubled again,⁵³ never falling below 40 and on one spectacular occasion (the 1990 term) rising above 100. Just as the paragraph above indicates a general convergence of practice which now catches most of the members of the Court, so the numbers in this paragraph suggests three rising "plateaus" into which the 50-year period can be divided. Both suggest that the citation of minority opinions in general *is* (although the self-citation of such opinions is *not*) a pervasive and persisting phenomenon attributable to the practices of the Court as a whole. And this in turn implies that it will continue into the Court's new century.

H.L.A. Hart has suggested that "A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered."⁵⁴ The same sentiment was expressed more pithily by United States Supreme Court Justice Jackson: "We are not final because we are infallible, but we are infallible only because we are final."⁵⁵ But this comment has to be qualified when the "statements that the court was 'wrong'" take the form of judicial dissents and separate concurrences that share the spotlight of citation and discussion and persuasion with the

⁵³ Only the inclusion of self-citations makes it appear that we should talk about a "tripling" rather than a "doubling" here, or about a minority citation level oscillating around 80 per year.

⁵⁴ Quoted in Brennan, *supra* note 41 at 429.

⁵⁵ Quoted in B. Schwartz, *A History of the Supreme Court* (New York & Oxford: Oxford University Press, 1993) 91.

⁵⁶ *Supra* note 36 at 626-54.

decisions from which they dissociated themselves. When some dissents (such as Le Dain's in *R. v. Therens*⁵⁶) and some separate concurrences (such as La Forest's in *Thomson Newspapers v. Canada*⁵⁷) are cited and quoted more often than the majority reasons themselves, it would seem that the traditional view of *stare decisis* has been modified in some very important way. The last quarter century (and even more pronouncedly the last decade) of the 20th century will stand as a unusual period during which the Supreme Court of Canada was uniquely ready to revisit prior decisions and to use as judicial authority those reasons which had been rejected by the majority of the Court, including an unprecedented number of dissents.

The obvious question, and one to which this article is only an introduction, is how deep this new practice really cuts — whether it is only a matter of judges occasionally picking up on some select “one liner” or a particularly apt aphorism, or whether it is sometimes more appropriate to think in terms of the emergence of an American-style “canonical dissent.”⁵⁸

⁵⁷ [1990] 1 S.C.R. 425 at 502-64.

⁵⁸ See e.g. R.A. Primus, “Canon, Anti-Canon and Judicial Dissent” (1998) 48 Duke L.J. 243; and A.S. Krishnakumar “On the Evolution of the Canonical Dissent” (2000) 52 Rutgers L. Rev. 781.